

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA v. JOHN BRYANT	CRIMINAL ACTION NO. 03-838-1 CIVIL ACTION NO. 17-1129
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MEMORANDUM

Baylson, J.

October 4, 2017

Defendant was charged in an Indictment with drug and firearm offenses, and plead guilty pursuant to a plea agreement where Defendant, his counsel and the Government, agreed that the appropriate sentence was 188 months' imprisonment. Following receipt of the presentence report, the Court imposed that sentence, which was at the low end of Defendant's guideline range. The presentence report classified Defendant as a "career offender" which had the effect of increasing the advisory Guideline sentencing range to 188-235 months. Nonetheless, the Defendant received the agreed upon sentence of 188 months on February 28, 2005.

The Defendant did not file an appeal or seek any post-conviction relief at that time.

Some 12 years later, relying on United States v. Mathis, 136 S. Ct. 2243 (2016), Defendant argues that his prior felony drug convictions no longer qualify as predicates for the career offender status and he should be resentenced without that status.

The Government's response contains a detailed review of the Mathis opinion, including the decision of Descamps v. United States, 133 S. Ct. 2276 (2013). The Court agrees with the Government that the Defendant is not entitled to relief. The Government has asserted, under the principles of Teague v. Lane, 489 U.S. 788 (1989), that Mathis is not retroactive.

The Court also agrees with the Government that the Defendant's §2255 petition is not timely, and that Defendant may not contest his career offender enhancement under §2255(f)(3) or §2255(e). 28 U.S.C. § 2255(f) requires that habeas corpus petitions be filed within one year of the latest of the following:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C § 2255(f). Defendant essentially asserts that Mathis v. United States, 136 S. Ct. 2243 (2016), makes his petition timely under § 2255(f)(3). However, as the Government notes, Mathis did not recognize a new rule or right; it merely clarified the process for comparing a state conviction to the generic federal offense. See 136 S.Ct. at 2257. On similar facts, the Tenth Circuit held that “[b]ecause Mathis did not announce a new rule” the defendant “[could not] rely on it in a § 2255 petition filed nearly fifteen years after the judgment in his criminal case became final.” United States v. Taylor, 672 F. App’x 860, 864 (10th Cir. 2016).

Even if the petition would be considered timely, the Court further agrees with the Government that Defendant's claim is without merit because the Pennsylvania statute criminalizing possession of controlled substances with intent to deliver qualifies as a predicate offense under the federal career offender definitions. Defendant's argument that he is not a career offender rests on Mathis' having abrogated prior Third Circuit precedent and having rendered the Pennsylvania drug statute indivisible. To the contrary, at least one published Third Circuit case has applied Mathis to find Pennsylvania's drug statute to be divisible. United States

v. Henderson, 841 F.3d 623, 628 (3d Cir. 2016). Defendant’s state law offense of “delivery” was not broader than its federal counterpart, “distribution.” Compare 35 Pa. Cons. Stat. § 780-102(b) with U.S.S.G. § 4B1.2(b). Accordingly, he has the necessary two prior felony controlled substance offense convictions to be considered a career offender under U.S.S.G. § 4B1.1(a).

For these reasons, the Court will deny Defendant’s motion for relief and will deny a certificate of appealability. An appropriate order follows.

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ORDER

AND NOW this 4th day of October, 2017, upon consideration of the Defendant's/Petitioner's Petition for Post-Conviction Relief under 28 U.S.C. § 2255, for the reasons stated in the foregoing Memorandum, it is **ORDERED** that the Petition is **DENIED**. There are no grounds for issuance of a certificate of appealability.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON
United States District Court Judge